SINGAPORE REPORTS

Tong Kok Chai v Ocean Front Pte Ltd & Anor

HIGH COURT (SINGAPORE) – SUIT NO 3092 OF 1987
THEAN J
15 JULY 1988

Civil Procedure – Interlocutory injunction – Serious question to be tried – Balance of convenience – Preservation of status quo pending trial

Companies and Corporations – Proposed articles of association – Amendment to articles – Bona fides

The plaintiff held 1,458,500 shares ('the shares') in the first defendant company Ocean Front Pte Ltd ('the company'). The plaintiff deposited the shares with the second defendant the Ka Wah Bank Ltd ('the bank') as security for banking facilities. Following disputes between the bank and the plaintiff over the plaintiff's alleged indebtedness to the bank regarding the facilities, the bank sold the shares to a person alleged to be a majority shareholder of the company, one Yap Sing Hock ('the purchaser'). There was no evidence, however, that the purchaser held any shares or controlled either the majority of the shares or a major or substantial portion of the shares in the company. The plaintiff disputed the right of the bank to sell the shares. Soon after the sale, the company issued a notice of an extraordinary general meeting for the purpose of passing, inter alia, a special resolution for altering the articles of association of the company. The proposed alterations included deleting the existing art 26, which restricted the transfer of shares and conferred on the members a right of pre-emption in the event of a transfer of shares to a person who was not a member of the company, and the substitution of new articles which gave to a member a right to transfer his shares to any person.

The plaintiff commenced the action against the company, claiming for an injunction to restrain the company from altering art 26 as proposed and a declaration that the proposed alteration, if passed, was null and void and also claiming damages.

The plaintiff applied ex parte and obtained an interim injunction restraining the company from altering art 26 and substituting therefor the proposed new articles until after the hearing of a motion returnable on 22 January 1988. The motion was in effect for continuation until the trial or further order of the injunction granted ex parte. In the meantime, the bank obtained an order allowing itself to be joined as the second defendant in the action.

The company argued that the statement of claim did not disclose any reasonable cause of action and therefore no injunction in the terms sought by the plaintiff should be granted and the ex parte injunction should be discharged. Counsel for the company suggested that instead an injunction restraining the company from registering the transfer of the shares be granted pending the trial.

At about that time, one Jo Hui Teck ('JHT') who held 3,000,000 shares in the company, was engaged in a similar dispute with the bank regarding his shares. The bank had entered into an agreement to sell these shares too to the purchaser. JHT instituted proceedings against the company in originating petition no 141 of 1987 and on the filing of the petition, he also applied ex parte for and obtained an injunction restraining the company from passing the special resolution for the alteration of its articles and also an injunction restraining the company from transferring these shares. That dispute was settled and eventually by consent, the ex parte injunctions were discharged and leave to withdraw the petition granted by order of the court. It appeared that if the injunction suggested by the company were to be granted in the instant action, the company would be at liberty to pass the special resolution and proceed with the registration of the transfer of the 3,000,000 shares sold to the purchaser.

Held, granting the interlocutory injunction: (1) The statement of claim contained sufficient averment of facts to found an action against the company claiming that the proposed alteration to the articles was not bona fide for the benefit of the company.

(2) The balance of convenience lay in favour of granting the injunction for if the injunction was not granted and it was found at the trial that the alteration to the articles was not bona fide for the benefit of the company as a whole, the court may have difficulty in declaring the alteration null and void and to set it aside so as to revert to the position before the passing of the special resolution, as shares in the company may have been transferred and registered on the basis of the articles as altered. The position, so far as the plaintiff was concerned, would be irreversible, and as between the plaintiff and the company, the impairment of the former's right as the shareholder was not really a matter that could be adequately compensated by payment of damages. If at the trial it was found that the company would be justified in altering the articles as proposed, its right of alteration of the articles would have been delayed and it would have been inconvenienced but it would not suffer irreparable damage. In the circumstances, the status quo should be preserved.

(3) The injunction proposed by the company should not be granted. The plaintiff had not asked for such an injunction and if it was granted, the company would be at liberty to pass the special resolution and proceed with the registration of the transfer of the 3,000,000 shares in respect of which the plaintiff's right of pre-emption under art 26 would not be protected by an injunction. That was the very right which the plaintiff sought in the proceedings to be protected.

Legislation referred to
Companies Act (Cap 50, 1985 Ed) s 216

James Chia for the plaintiff.
Ng Khai Ming for the first defendant.
Johnny Cheo for the second defendant.

Cur Adv Vult

Thean J: At the hearing of the application by way of notice of motion filed by the plaintiff, I granted to him an interlocutory injunction restraining the first defendant from altering art 26 of its articles of association until the hearing of this action or until further order. The material facts that led to the application before me are as follows. The plaintiff is a shareholder of Ocean Front Pte Ltd ('the company'), the first defendant, holding 1,458,500 shares of $1 each ('the shares') in the capital of the company. The company was incorporated in Singapore

and has an authorized capital of $100 million divided into 100 million shares of $1 each, of which 59 million shares have been issued and are fully paid up. In May 1984, the plaintiff deposited the shares with the Ka Wah Bank Ltd ('the bank'), the second defendant, which is a bank incorporated and carrying on business in Hong Kong, as security for banking facilities. On 6 August 1986, the bank commenced legal proceedings against the plaintiff in suit no 4468 of 1986 in the High Court claiming the sum of HK$37,467,280.98 together with interest and costs. The claim was resisted, and is still being resisted, by the plaintiff and his defence is briefly as follows:

(i) the loan or overdraft granted to the plaintiff was not due for repayment until 24 June 1990, and
(ii) the second defendant in any event had violated the Banking Act of Singapore in that it conducted banking business in Singapore without a banking licence and therefore the loan or overdraft granted to the plaintiff was illegal, void and irrecoverable.

The plaintiff also counterclaims for the return of the shares on the ground that they had been released to him on 12 June 1985, as evidenced by a document which he called the memorandum of release. The bank applied for summary judgment against the plaintiff, but in view of the defences raised, obviously, there are triable issues, and according to the plaintiff and not denied by the bank the application was withdrawn and the action is still pending.

On 3 October 1986, the bank initiated proceedings against the company in originating summons no 1176 of 1986 in the High Court claiming for an order that in respect of the shares the register of the company be rectified by striking out the name of the plaintiff and inserting in lieu thereof the name of the bank as the holder of the shares. In support of the application, one Mr Phoon Chiong Kit, an officer in the special accounts department of the bank, deposed to the fact that the bank was holding the shares as an equitable mortgagee and that the bank was entitled to perfect it as a legal mortgage. The plaintiff applied for an order to be joined in those proceedings, and on 9 February 1987 an order was made joining the plaintiff as the second defendant therein. About seven months later, on 30 September 1987, the solicitors for the bank wrote to the plantiff's solicitors suggesting that the originating summons be adjourned sine die with liberty to restore pending the resolution of the disputes in suit no 4468 of 1986, as that would 'serve to preserve the status quo between all the parties'. That suggestion appeared to have been acceded to by the plaintiff's solicitors.

On 7 October 1987, however, the bank, in exercise of what it presumably considered to be its rights as mortgagee, sold the shares to 'a majority shareholder of the company'. Notice of such sale was subsequently given to the plaintiff who disputed the right of the bank to sell the shares. Soon thereafter, on 10 November 1987, the company issued a notice of an extraordinary general meeting to be convened for 8 December 1987 for the purpose of passing, inter alia, a special resolution for altering the articles of association of the company. The proposed alterations, so far as relevant to the present proceedings, include the deletion of the existing art 26, which restricts the transfer of shares and confers on the members a right of pre-emption in the event of a transfer of shares to a person who is not a member of the company, and the substitution of new articles, which in effect gives to a member a right to transfer all or any of his shares to any person (except an infant, bankrupt or person of unsound mind).

The plaintiff thereupon commenced this action against the company, claiming for an injunction to restrain the company from altering art 26 of the articles of association as proposed and a declaration that the proposed alteration to art 26, if passed, is null and void and also claiming damages. On or immediately after the issue of the writ the plaintiff applied ex parte and obtained an interim injunction restraining the company by their directors, officers, servants or agents or otherwise howsoever from altering art 26 of its articles of association by deleting art 26 and substituting therefor the proposed new articles at an extraordinary general meeting convened for 8 December 1987 or at any adjournment thereof until after the hearing of a motion returnable on 22 January 1988. Before the motion could be heard, the bank applied for and obtained an order allowing itself to be joined as a second defendant in this action. The motion eventually came before me; it was a motion for an injunction in terms identical with the injunction obtained ex parte save that it is to continue until the hearing of this action or until further order. In effect, it is a motion for a continuation of the injunction granted ex parte. At the conclusion of the hearing I allowed the motion and made an order in terms thereof.

The facts which I have recited were collected and collated from the affidavit affirmed by the plaintiff on 1 December 1987 and filed in support of his application for the ex parte interim injunction, and, so far as I can see, they were not disputed or challenged by the company or the bank. That was the only affidavit filed relative to the application before me. Surprisingly, no affidavit was filed on behalf of the company to give any reason or explanation for the proposed alteration of the company's articles of association and the necessity for such alteration at this stage. The reasonable inference to my mind is that probably the company could not really give any cogent reason or explanation for the proposed alteration.

On behalf of the bank there was an affidavit filed which was affirmed by Mr Phoon Chiong Kit on 1 March

1988, but that affidavit was filed in support of an application by the bank to be joined as a party; it was not filed for the purpose of opposing the grant or the continuation of the injunction. However, it has some bearing on the application before me, and certain material facts emerged thereform. First, the purchaser of the shares is one Yap Sing Hock ('the purchaser'), and according to a copy of the instant information search exhibited in the plaintiff's affiavit, the purchaser is a director but not a shareholder of the company. Presumably, he is the person referred to in the bank's solicitors' notice to the plaintiff in which they said that the bank had sold the shares to 'a majority shareholder' and presumably also, though he does not hold any shares, he controls either the majority of the shares or a major or substantial portion of the shares in the company. There is, however, no evidence specifically on this point. Secondly, according to Mr Phoon, the sale agreement made with the purchaser by implication imposes on the purchaser an obligation to procure the company to effect an alteration to its articles of association and to have shares registered in his name. On the other hand, it is an express term of the agreement that the purchaser is entitled to rescind the agreement if 'any third party' takes any legal proceedings to restrain the alteration of the articles of association of the company, unless the bank has before the expiry of six months from the date of completion of sale of the shares obtained a discharge of any injunction obtained by such third party or a discontinuance of those proceedings. The circumstances of such sale and why the bank chose to sell the shares to the purchaser who is not a member of the company were not explained. I note, however, in passing a rather curious and inexplicable statement in Mr Phoon's affidavit that 'in order to preserve its (the bank's) security over the shares' the bank entered into the sale agreement with the purchaser for the sale of the shares. That sale surely was to enforce and realize the security over the shares and certainly could not be said 'to preserve the security'. At this stage I refrain from expressing any view on the propriety or legality of such a sale; suffice here to say that that statement was confusing and wrong.

It is abundantly clear to me that the bank and the purchaser were working in collaboration towards attaining the common objective – completion of the sale of the shares to the purchaser irrevocably. Principally, it is the purchaser who was instrumental in initiating the proposed exercise by the company for the alteration of its articles of association – this of course is an inference and, it seems to me, an irresistible inference. On the facts before me, which I have said were not in dispute, and on the inference which I can reasonably draw, there is clearly a serious question to be tried, namely: Whether the proposed alteration of art 26 of the articles of association is bona fide for the benefit of the company as a whole. Neither counsel for the company nor counsel for the bank seriously contended that there was no such issue to be tried.

Counsel for the company argued that the statement of claim did not disclose any reasonable cause of action and therefore no injunction should be granted and the ex parte injunction granted should be discharged. I rejected this argument. I do not agree that the statement of claim is fundamentally defective in that it discloses no reasonable cause of action. In my view it contains sufficient averment of facts to found an action against the company claiming that the proposed alteration to art 26 is not bona fide for the benefit of the company. Surely on the facts pleaded the plaintiff has a right of complaint. It is significant that since the service of the statement of claim, the company has not taken any application to strike out the statement of claim and dismiss the action on that ground, which it could have done. At any rate, as the bank has been joined as a party, it would be necessary for the plaintiff to amend the statement of claim accordingly.

I now turn to the next question relevant to the grant of an interlocutory injunction, that is, the balance of convenience. Here again, I find that the balance of convenience is in favour of granting the injunction. If the injunction was not granted and it is found at the trial that the alteration was not bona fide for the benefit of the company as a whole, the court may have difficulty in declaring the alteration null and void and set it aside so as to revert to the position before the passing of the special resolution, as shares of the company may have been transferred and registered on the basis of the articles as altered; the position, so far as the plaintiff is concerned, is irreversible, and as between the plaintiff and the company, the impairment of the former's right as a shareholder in such an event is not really a matter that could be adequately compensated by payment of damages. If the injunction was granted, as I did grant it, and it is found at the trial that the company is justified in altering its art 26 as proposed, the consequence would be that its exercise of its right of alteration of articles of association has been delayed, it has been inconvenienced by the injunction. I do not think that it would suffer irreparable damage. As between the plaintiff and the bank, the latter's right of sale of the shares is disputed, and they have accepted that in suit no 4468 of 1986 there were triable issues. Plainly in the circumstances the status quo should be preserved.

Counsel for the company suggested that in lieu of the injunction applied for, an injunction restraining the company from registering the transfer of the shares be granted. That injunction is entirely different. I declined to grant such an injunction; it was not asked for on behalf of the plaintiff, though it occurred to me that, from h is point of view, such an injunction was or might be neces-

sary in addition to that asked for in the notice of motion. Further, such an injunction as suggested by the company did not appear to me acceptable to the bank; it would indeed be a surprise if it was. I think the reason for this unusual stance taken by the company is this, and this again is a matter of inference, since no explanation has been furnished. There was also fixed for hearing before me at the same time as this motion, originating petition no 141 of 1987 filed by another shareholder of the company, namely, Jo Hui Teck ('JHT') who held 3,000,000 shares in the company. There was a similar dispute between JHT and the bank with regard to the 3,000,000 shares, and the bank also entered into an agreement for the sale thereof to the purchaser. JHT instituted proceedings against the company in originating petition no 141 of 1987 under s 216 of the Companies Act (Cap 50, 1985 Ed). On the filing of the petition, JHT also applied for and obtained an ex parte injunction restraining the company from passing the special resolution for the alteration of its articles of association and also an injunction restraining the company from registering the transfer of these shares. That dispute was subsequently settled, and at the hearing before me the parties asked for and I made an order, by consent, that the ex parte injunctions be discharged and leave to be granted for withdrawal of the petition with no order as to costs. It seems to me that if the ex parte injunction granted in this action is discharged and, as suggested by the company, an injunction restraining the registration of the transfer of the shares is granted, the company would be at liberty to pass the special resolution and proceed with the registration of the transfer of the 3,000,000 shares sold to the purchaser; the company would then be content to leave the transfer of the shares held up until the outcome of the trial. If this inference is correct, then this precisely is the position which the injunction in this case seeks to prevent. The plaintiff as a member of the company is entitled to have the benefit of the pre-emptive right under art 26 in respect of those 3,000,000 shares which were to be transferred to a person who is not a member of the company.

For all these reasons I have come to the conclusion that the interlocutory injunction ought to be granted and I made the order accordingly.

Order accordingly.

Solicitors: *ST Kay & Co*; *PK Wong & Co*; *Shook Lin & Bok*.

Reported by *PS Ranjan*

Foo Kee Boo & Anor v Ho Lee Investments (Pte) Ltd

HIGH COURT (SINGAPORE) – ORIGINATING SUMMONS NO 469 OF 1984
GRIMBERG JC
14 JULY 1988

Contract – Housing developers – Option in form prescribed by legislation – New option – Option form amended without approval of Controller of Housing – Breach of legislation – Consequences – Whether binding contract in existence – Housing Developers (Control and Licensing) Act (Cap 250, 1970 Ed), ss 4, 20 & 21 – Housing Developers Rules 1976, rr 10(B) & 20

Statutory Interpretation – Housing developers – Option in form prescribed by legislation – Option form amended without approval of Controller of Housing – Breach of legislation – Consequences – Intention of legislature – Housing Developers (Control and Licensing) Act (Cap 250, 1970 Ed) ss 4, 20 & 21 – Housing Developers Rules 1976, rr 10 20

Land Law – Conveyancing – Sale of house – Option in form prescribed by legislation – New option – Option form amended without approval of Controller of Housing – Sale and purchase agreement signed – Purchasers not proceeding with purchase – Forfeiture of moneys paid – Housing Developers (Control and Licensing) Act (Cap 250, 1970 Ed), ss 4, 20 & 21 – Housing Developers Rules 1976, rr 10(B) & 20

The plaintiffs obtained from the defendants an option to purchase a house in the defendants' development. The option was in Form D of the Schedule to the Housing Developers Rules 1976 ('the Rules') and the consideration for it was the sum of $72,400 paid as the booking fee and which was equivalent to 10% of the purchase price. In compliance with the terms of the option, the defendants' solicitors wrote to the plaintiffs enclosing, inter alia, the agreement for sale and asking the plaintiffs to return the agreement duly signed by the plaintiffs with a cheque for $72,400 which, together with the booking fee, amounted to 20% of the purchase price. By virtue of cl 2 of the option, the plaintiffs had three weeks from the date of delivery of the agreement to them, ie until 10 February 1984, to exercise the option by signing the agreement. By virtue of cl 3 of the option, the sum of $72,400 was payable upon execution of the agreement by the defendants. Clause 4 of the option provided, inter alia, that if the plaintiffs did not wish to exercise the option or allowed it to expire without exercising it, the defendants shall refund 90% of the booking fee if the purchase price was $200,000 or below or 95% of the booking fee if the purchase price was more than $200,000.

On 8 February 1984, ie two days before the option was due to expire, the plaintiffs' solicitors telexed the defendants' solicitors for an extension until 17 February 1984 to sign and return the agreement. The defendants' solicitors replied on 13 February 1984, ie three days after the option had expired, agreeing to extend the period to 17 February 1984.

On 17 February 1984, the plaintiffs' solicitors wrote to the defendants' solicitors enclosing the agreement duly signed by the plaintiffs. They enclosed also a cheque post-dated to 29 March 1984 for the sum of $72,400 which was to be paid under cl 3 of the option upon the agreement being signed by the defendants. The plaintiffs' solicitors stated that it had been mutually agreed between the plaintiffs and the defendants that the sum of $72,400 payable under cl 3 of the option would be